Nos. 22230 and 22230A

In the

United States Court of Appeals

For the Ninth Circuit

PACIFIC COAST ENGINEERING COMPANY, a corporation,

Appellant,

vs.

MERRITT-CHAPMAN & SCOTT, a corporation,

Appellee.

Appellant's Reply Brief

On appeal from the United States District Court for the Northern District of California, Northern District

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McCUTCHEN, DOYLE, BROWN & ENERSEN
NORMAN B. RICHARDS
DAVID M. HEILBRON
601 California Street
San Francisco, California 94108

Attorneys for Appellant

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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I.

INTRODUCTION

Appellee's Brief says there are two questions presented, first whether the evidence sustains "the findings and conclusions that Paceco breached its contract," and second whether it sustains "the findings and conclusions that Merritt-Chapman had a right to terminate Paceco's contract." (Ans. Br. 9)* The answer to both questions is no.

*Appellee's Answering Brief is referred to as "Ans. Br. ...."

Appellee's brief takes them up one at a time, and this brief does too.

The questions are separate, and appellee has properly kept them so. The court did not find that any breach which is the subject of the first question was material, or entitled appellee to terminate (Part A, below). The court found that appellant refused to perform the contract without more money, and that *that* was a material breach which entitled appellee to terminate (Part B, below) That refusal is the subject of the second question only. Therefore even if the answer to the first question is yes, the judgment must be reversed unless the answer to the second question is also yes.*

II.

ARGUMENT

A. Appellee's claim that "the evidence sustains the findings and conclusions that Paceco materially breached its contract."

Appellee's claim that the evidence sustains the findings and conclusions that Paceco "materially breached" its contract (Ans. Br. 9) is, to start with, misstated, because the court did not find that any of the alleged breaches which are its subject was "material." (pp. 4-7, below) It is also wrong, because the four propositions on which it is based are wrong, irrelevant, or both.

1. *First proposition.* The first proposition on which appellee's claim is based is that "Paceco, not Merritt-Chapman, had the duty to make, and in fact made, the hoist capacity calculations." (Ans. Br. 9)

Appellant conceded for the purposes of its argument here that that was so (O.Br. 6-7)†, and appellee's elaborate

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*If the answer to the first question is no, the judgment must be reversed whatever the answer to the second. (See, Appellant's Opening Brief, p. 4)

†Appellant's Opening Brief is referred to as "O.Br. ...."

argument about it (Ans. Br. 9-11) is therefore beside the point.

Appellant's Brief did say that "MCS and Pacific provided hoist capacity calculations to Paceco for Paceco's use in performing its contract up until Harza disapproved the calculations (August 1957-February 1958)." Appellee contends that "the District Judge found to the contrary," citing Findings 15, 18, 19 and 20, C.T. 189-191. None of those findings is to the contrary, and none could be; MCS and Pacific signed six letters which prove that what appellant said is true. (Exs. 5, 6, 11, 12, 12B, 15; O.Br. 5-7; see also, remarks of trial court, R.Tr. 907-910)

That truth is not relevant because it demonstrates that Paceco was not obligated to make the final calculations, but because the calculations Pacific and MCS "provided" Paceco for its "use" show that all the parties understood that the safety "in motion" factor referred to moving, not static, frictions.* (O.Br. 16-17)

2. *Second proposition.* The second proposition on which appellee bases its claim that Paceco "materially breached" its contract is that "Paceco's calculations should have applied, but failed to apply, the gate motion factor of safety to static resisting forces." (Ans. Br. 12)

This was indeed the primary and only really significant thrust of the dispute between the contractors' engineers who read the specifications and the engineer to the public agency who wrote them. However, here again appellee's

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*MCS continued to send calculations to Paceco after Harza's rejection, right up to the date of termination. Paceco continued to work on them until then, and that is also relevant to show the impropriety of MCS terminating Paceco without warning. See, pp. 9-12, below; O.Br. 8-11, 28-30)

brief refuses to be relevant or responsive. The evidence reviewed by appellee under this heading (Ans. Br. 14-15) in numbered paragraphs 1-7 is all unimportant except paragraph numbered 6.*

> "6. Interpretation of the gate motion factor of safety to require gates weighing 1½ times running resisting, rather than static resisting forces, will wholly defeat the purpose of the factor of safety, namely, to insure closure, and Paceco knew it. Finding 17 (CT 190); (Zweifel, R.T. 618-623)."

This last quoted statement is important but patently erroneous. Gates weighing 1½ times running resistance will not defeat the purpose of the factor of safety, namely, to insure closure so long as they weigh more than *one* times static resisting forces (Ans. Br. 15, para. 2). The point made by Paceco to MCS and Harza, by Paceco in the court below and by Paceco in its opening brief here is that 1½ times running as specified, or more than one times static as appellee says is necessary to cause the gates to go down, do not equal 1½ times static. In other words, you can not get 1½ out of 1+. (O.Br. 18-20) People who want 1½ times static should say so in the specifications.

Appellee's paragraph eight is appellee's conclusion, and it is based upon all the premises set forth in each of its paragraphs one through seven. Since paragraph six is a

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*As appellee's brief notes, its points 1, 2, 3, 4, 5 and 7 are generally conceded by Paceco's own testimony and we concede them for this argument, except that No. 5 should have the words "necessarily in all cases" added and read "Gates weighing 1½ times running resistance forces will not *necessarily in all cases* start to move at all and Paceco knew it." That does not alter the fact that Paceco was entitled to assume that the engineer who prepared the specifications had determined that in *this case* gates weighing 1½ times running resisting forces will close. (O.Br. 17-19)

false premise, paragraph eight is false for the same reason it is.*

In any event, whoever was right or wrong, the court did not find that Paceco's having submitted calculations based on its good faith and reasonable interpretation of the specifications was a material breach entitling MCS to terminate. It could not have done so, because that event respected a small part of the contract, because those calculations were superseded shortly after they were submitted, anyway, and because, so far from treating their submission as a material breach, MCS asked Paceco to work upon the calulations which superseded them, which it did. (pp. 9-12, below)

3. *Third proposition.* The third proposition on which appellee bases its claim that Paceco "materially breached" its contract is that "Paceco's calculations contained numerous errors and omissions which were far more significant than the gate motion factor of safety." (Ans. Br. 18)

That is not so.

The court found that when Harza rejected Paceco's calculations it "advised" that they "were much too low and that the gate motion factor of safety must be applied to starting or static frictions, and pointed out numerous other errors in Paceco's calculations." (Finding 22, C.T. 192) It did not find that those "numerous other errors" constituted a material breach, and could not. They were of the kind "normally expected," there was "no argument" about them,

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*Nor is appellee helped on this feature of its argument by its reference to the court's finding that the testimony of witness Martin was true and correct. What Martin testified or thought about his specifications is not important. What he wrote in the specifications or communicated to bidders before the bids is important. Nothing about 1½ times static was written or spoken in that stage of the proceedings.

and they concerned no one. (R.Tr. 634-640; O.Br. 8, n. 6)* What did concern the parties was that Paceco's calculations applied the safety factor to moving frictions. That was Harza's "number one objection" to them, that was the "guts" of Harza's rejection letter (R.Tr. 639), and that was the part of the rejection letter to which Paceco objected (R.Tr. 639-641) (Ex. I, enclosure, p. 1)† Indeed, appellee told the court that that was the source "of major friction" (R.Tr. 73; O.Br. 16), and the court said it was "the center of controversy." (Memorandum of Judgment, C.T. 163, ll. 17-20)

Moreover, it makes no difference whether there were "numerous other errors" in Paceco's calculations or not, because after they were rejected MCS itself "undertook" to make the calculations, and asked Paceco to help it, which it did. (O.Br. 8-11) Paceco's original calculations were "superseded". (Ex. AH; pp. 9-12 below) Accordingly, whatever errors were in them to start with is academic.

4. *Fourth proposition.* The fourth proposition on which appellee bases its claim that Paceco "materially breached"

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*The court's Finding 17, C.T. 190, states that Paceco's calculations contained "other material errors and omissions," but it relates to *bid* calculations, not those which Harza rejected. Moreover, even if the errors in those which Harza rejected were "material," it is not so, and the court did not find, that the mere submission of calculations with "material" errors constituted a material breach. (See, pp. 9-12, below)

†Paceco also objected to Harza's putting "an additional hydraulic load" on two of the gates. (R.Tr. 640; Ex. I, enclosure, pp. 1-2) There is no finding that appellee was right on that one, much less a finding that the original calculations' omission of hydraulic load was a material breach, or that such loads were indicated on the drawings by Harza as the specifications required. So far as safety factors are concerned, the court found that Mr. Martin's testimony was true (Finding 17, C.Tr. 190), and Mr. Martin testified that one may properly apply the safety factor to static forces alone, and may properly omit to apply it to hydraulic load at all (which is the same as buoyancy). (R.Tr. 1016)

its contract is that "Paceco's proposed hoist capacities were too weak even in terms of Paceco's calculations." (Ans. Br. 19)

That proposition is beside the point for the same reasons that appellee's third proposition is: The calculations' "errors and omissions" on which the proposition is based concerned no one, and the calculations which contained them were superseded, anyway.

B. Appellee's claim that "the evidence sustains the findings and conclusions that Merritt-Chapman rightfully terminated Paceco's contract."

Appellee's claim (Ans. Br. 20) that "the evidence sustains the findings and conclusions that Merritt-Chapman rightfully terminated Paceco's contract" is based upon two propositions, both of which are wrong.

1. *First proposition.* The first proposition upon which appellee's claim is based is that "Paceco did repeatedly and unequivocally refuse to perform unless Merritt-Chapman capitulated to its demand for more money," and "the court so found." (Ans. Br. 20, citing Finding 23, C.T. 192)

The court did not so find. What it did find is set forth at Appellant's Opening Brief, pp. 14-15, and it is this:

> "After being advised of Harza's refusal to approve Paceco's calculations and its reasons, Paceco sought to defend its calculations and finally advised Merritt-Chapman that it would not deliver any hoists of a rated capacity greater than the ones contemplated by its calculations, except upon payment of additional sums amounting to $85,285.00 for hoists of the capacity which Harza said would be required.
>
> Paceco's refusal constituted a material breach of its contract." (Findings 23-24, C.T. 192)

Appellee pronounces that that finding "is supported by the contemporary evidence," but appellee does not say one word as to how. (Ans. Br. 20) The "evidence" is documents (Exs. C, AE, B, AJ, I and 19), a page of testimony (R.Tr. 157) identifying one of the documents (Ex. 19), and nothing else. Appellant's Opening Brief discussed those documents at length. (See, pp. 8-11, 22-28) They establish that the court's finding is contrary to the evidence, and is wrong as a matter of law, for the reasons and upon the authorities set forth at Opening Brief, pages 20-31. Appellee does not answer one of those reasons or challenge one of those authorities.* Its failure to do so proves that it can't.

Appellee also claims that the court's finding is "supported by Mr. Ramsden's reluctant concession at the trial," which appellee undertakes to quote. (Ans. Br. 20) First, appellee has left out of the passage the two sentences which conclude it. They show that the passage's subject was a document, Ex. B, and that Mr. Ramsden was merely being asked to characterize it (R.Tr. 219-220):

> "The Witness: But I didn't—I don't think it is fair to ask me if we refused.
>
> "The Court: That may be an arguing work (sic; should be "word"), but Mr. Lennihan certainly has the right to argue that that is what it meant. Now, if you want to argue what the letter means, you can argue it to me.
>
> "Mr. Lennihan: I would just like to introduce the letter in evidence.
>
> "The Court: Oh, yes, certainly, if it isn't already in."

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*The only case appellee cites, *Coughlin v. Blair,* 41 C.2d 587 (1953), concerned an actual failure to perform on time which constituted a total breach, and had nothing to do with anticipatory breach, much less a refusal to perform unless paid more money.

Second, Mr. Ramsden's statement is entirely irrelevant, whatever it means, because it was made at trial, not before, and all the "contemporary evidence" is documentary. (Ans. Br. 20; O.Br. 8-12, 22-28) A statement cannot constitute an anticipatory breach unless "treated and acted upon as such by" the party to whom it is made, and a statement made at trial, when the contract to which it refers has already been terminated, cannot be acted upon at all. See, *Campos v. Olson,* 241 F.2d 661, 663 (9th Cir. 1957) (letter is not anticipatory breach "because it did not come to the attention of appellant until . . . litigation was under way"); *Rauer's Law & Collection Co. v. Harrell,* 32 Cal. App. 45, 66 (1916) (testimony at trial as to state of mind is not anticipatory breach because it was not communicated before trial); O.Br. 26-28.

2. *Second proposition.* The second proposition upon which appellee bases its claim that the evidence "sustains the findings that Merritt-Chapman rightfully terminated" is that "Paceco was in actual, as well as anticipatory, breach when Merritt-Chapman cancelled."

The "actual breach," according to appellant, is that "after its calculations on Bid Items 1, 2, 8 and 9 were rejected, . . . [Paceco] refused to provide further calculations, blaming others for its errors and claiming that others had the duty to do the hoist calculations." (Ans. Br. 21)

That is a theory which appellee did not try in the trial court. It is also false, and there is no finding to support it. The court found that Paceco "finally advised that it would not deliver any hoists of a rated capacity greater than the one contemplated by its calculations, except upon payment of additional sums . . .," and that *that* "refusal constituted a material breach. . . ." That is the basis on which the court decided that Merritt-Chapman rightfully

terminated. The court did not find that Paceco "refused to provide further calculations" or that any such refusal constituted a material breach, and that is not the basis on which the court decided that Merritt-Chapman rightfully terminated. (See, Findings 22-23; Memorandum of Judgment, C.T. 165)*

It could not have done so. Two weeks after Paceco's calculations were rejected by Harza, Paceco advised that "to redesign our hoists in accordance with Harza Engineering Company's letter, it will be necessary that new hoist capacities be furnished to us by Pacific Car and Foundry . . . [A]*s soon as we receive the revised capacities from Pacific Car and Foundry we will furnish the information requested in Harza Engineering Company's letter.* . . . (Ex. AE) (emphasis added) Two weeks later, Merritt-Chapman itself sent some Pacific drawings to Paceco, together with 23 pages of its own computations, solicited Paceco's comments, and told Paceco it would send more calculations "as soon as available." (Ex. AF)

Paceco dutifully sent MCS the comments it had solicited. (Ex. AG) Then MCS sent Paceco some more calculations, which "supersede[d]" those which had previously been sent, and solicited Paceco's comments again. (Ex. AH) MCS told Paceco that it "undertook" to provide the calculations as a "concession" to Paceco "in the interest of time saved."

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*Appellee relies upon the trial court's statement, in its Memorandum of Judgment, that "under California law a present breach of contract *plus a repudiation of the* contract results in a total breach of the contract . . . ." (Ans. Br. 21) (Emphasis added) But that "California law" requires a repudiation, and just puts appellee back where it started—there is no evidence to support a finding of repudiation. See, pp. 7-9, above; O.Br. 20-31. See also, Restatement, Contracts, §§ 317, 318; 1 Witkin, Summary, Contracts, § 264, p. 295.

(Ex. AI, p. 2)* The parties conducted themselves in accordance with that undertaking to the day Merritt-Chapman terminated Paceco's contract: MCS worked upon calculations, sent them to Paceco for checking, which Paceco did, and all along Paceco advised it would complete design of the hoists as soon as it had received final information from MCS. (O.Br. 8, 10-11)

MCS cannot claim that it terminated the contract because Paceco did not provide the calculations which MCS told Paceco it had undertaken to provide, and which MCS asked Paceco to work upon. That is true even if Paceco's failure to provide correct calculations were a total or material breach of contract, and even if the court had found it to be one, because one who does not treat a breach as total and, after the breach has occurred, asks or permits another to continue to work upon the contract, cannot terminate on account of the breach. See, *Boone v. Templeman,* 158 Cal. 290, 296-297 (1910); *American-Hawaiian Eng. Etc. Co. v. Butler,* 165 Cal. 497, 518-519 (1913); *Gateway Company, Inc. v. Charlotte Theatres, Inc.,* 297 F.2d 483, 484-485 (1st Cir. 1961); *Coughlin v. Blair,* 41 C.2d 587, 593-594, 598-599, 602 (1953) (sole case cited by appellee, O.Br. 21); Restate-

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*Appellee claims (Ans. Br. 7) that the court found that MCS "was forced to make the revised calculations . . . ," and cites Finding 23, which says nothing of the kind. Neither does any other finding. MCS "undertook" to do it as a "concession," as its own letter, which the text quotes, says.

The court did find that Paceco had the obligation under its contract to make the necessary calculations of required hoist capacities (Finding 15), and that nobody relieved it of that contractual responsibility. (Finding 19) Paceco does not dispute those findings on this appeal (O.Br. 6-7; pp. 2-3, above). Therefore conceivably Paceco's not performing all the work on the calculations was a partial breach giving rise to a claim (which MCS has never asserted) for MCS' costs for making the calculations itself. But that does not help MCS, which needs an excuse for terminating. (pp. 11-12, below)

ment of Contracts, §§ 309, 311; 1 Witkin, Summary, Contracts, § 297.*

III.

CONCLUSION

Appellant's Opening Brief sets forth the reasons why the trial court's judgment must be reversed. Appellee does not meet one of appellant's arguments. It does not challenge any of appellant's authorities. It disregards the findings on which the trial court decided this case. It bases its argument on findings which do not exist. Its brief is simply beside the point.

The trial court's judgment should be reversed.

Dated: July 18, 1968.

Respectfully submitted,

McCutchen, Doyle, Brown & Enersen
Norman B. Richards
David M. Heilbron

By Norman B. Richards

Attorneys for Appellant Pacific Coast Engineering Company

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*Under some circumstances a party can reinstate his right to terminate upon giving the other party "definite and specific notice" of his intention to do so if the breach is not cured within a "reasonable time." See, e.g., Restatement of Contracts, § 311; *Boone v. Templeman,* above, at 296-297; *Powell v. Cannon,* 119 C.A.2d 748, 752 (1953).